

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In the Matter of)

General Communications, Inc.)

CC Docket No. 98-4

Petition for Preemption)

Pursuant to Section 253 of)

the Communications Act of 1934)

RECEIVED

FEB 27 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI Telecommunications Corporation ("MCI") hereby submits its comments in support of the above-referenced petition filed by General Communications, Inc. ("GCI") seeking federal preemption pursuant to Section 253(d). Based on the record developed thus far, MCI must concur with GCI that Section 52.355 of the Alaska Administrative Code ("AAC")¹ contravenes the nondiscriminatory and competitively neutral mandates of Section 253(a) and (b) of the Telecommunications Act of 1996 ("Act") and should therefore be preempted.

I. SECTION 52.355 IS PREEMPTED BY FEDERAL LAW

Section 52.355 of the AAC unlawfully erects a legal barrier that not only impedes, but explicitly prohibits telecommunications entities other than the incumbent intrastate long distance carrier AT&T Alascom, from building facilities necessary to provide intrastate interexchange services to consumers in significant portions of rural Alaska. Section 253(d) of the Act gives the Federal Communications Commission ("the Commission") the power to preempt any state "statute, regulation, or legal requirement" that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," or that imposes requirements to preserve and advance universal service in a manner that is not

¹ 3 AAC § 52.355

competitively neutral. 47 U.S.C. §§ 253(a),(b),(d). Section 52.355 of the AAC does both. It erects an absolute barrier to entry that prohibits GCI and other entities from constructing facilities to provide long distance service in competition with AT&T Alascom in certain parts of Alaska. On its face, Section 52.355, violates both Sections 253(a) and (b).

In Section 253, entitled "Removal of Barriers to Entry," Congress explicitly intended that the FCC preempt all state and local regulations that act as barriers to entry into the interstate and intrastate telecommunications markets:

(a) IN GENERAL. -- No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State Regulatory Authority. -- Nothing in this section shall affect the ability of a State to impose, *on a competitively neutral basis* and consistent with section 254, requirements *necessary* to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

47 U.S.C. § 253(a), (b) (emphasis added). Section 52.355 is precisely the class of state regulation Congress sought to eradicate with the enactment of Section 253.

It is apparent from the record developed thus far, that a majority of the interested parties in Alaska are in agreement with GCI. The APUC Staff concluded that "3 AAC 52.355 violates Section 253(a) of the Act as the state regulation prevents carriers from offering facilities-based services to customers in most rural areas of Alaska."² APUC Staff therefore recommended that

² See Memorandum of Lori Kenyon, Common Carrier Specialist, Alaska PUC, Docket R-97-1, Aug. 22, 1997, at 1 (attached to GCI petition as Exhibit C).

the APUC “conclude that 3 AAC 52.355 is unenforceable as it is preempted by the Telecommunications Act of 1996.”³ The Alaska Attorney General’s office also concurred and issued a memorandum stating that the APUC “should issue an order declaring the regulation invalid, state that the Commission does not intend to enforce it, and initiate a regulations docket to repeal 3 AAC 52.355.”⁴ Further, Chairman Cotten and Commissioner Ornquist of the APUC stated that Section 52.355 is not in conformance with the terms of Section 253 and therefore unenforceable as a matter of law.⁵

II. ALASKA’S DECISION TO DELAY ACTION ON SECTION 52.355 IS UNWARRANTED BECAUSE CONGRESS HAS DECIDED POLICY AS A MATTER OF LAW

There seems to be little dispute that Section 52.355 is a barrier to entry and not competitively neutral as required by Sections 253(a) and (b) of the Act. Despite all of this, the APUC nevertheless decided to postpone any decision on the regulation’s fate pending a report from its staff on the “policy” implications of removing Section 52.355’s prohibition.⁶ This decision was unnecessary. Congress has already considered the impact of competition on various telecommunications markets and concluded that competition, in all markets, is in the public interest.

In the Act, Congress created “a pro-competitive, de-regulatory national policy framework

³ *Id.* at 3.

⁴ See Memorandum of Ron Zobel, Assistant Attorney General, State of Alaska, Department of Law, Aug. 22, 1997, at 1 (attached to GCI petition as Exhibit D).

⁵ See APUC December 17, 1997, Public Meeting, Transcript at Fn. 2 at 24-26 (“APUC Public Meeting Transcript”) (attached to GCI Petition as Exhibit F).

⁶ *Id.* at 36-37.

designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to *all* Americans by opening *all* markets to competition.”⁷

In implementing the Act, the FCC recognized that “the opening of all telecommunications markets to all providers will . . . bring new packages of services, lower prices and increased innovation to American consumers.”⁸ Prohibitions on entry, such as Section 52.355, therefore, deprive many Alaskan consumers of the benefits of competition envisioned by Congress. Recognizing that States have restricted full and fair competition either by statute or through the public utility commission’s regulations,⁹ Congress preempted all state and local statutes or regulations that have the effect of prohibiting entry into any telecommunications market.

Where Congress has legislated, the Supremacy Clause mandates that federal law displace inconsistent state regulation. Federal law may preempt state law in at least three ways. First, Congress may expressly preempt state law in a particular area; second, even where Congress has not expressly so provided, an intent to displace state law in a specific area may be implied where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation; and third, state law may be preempted to the extent that it conflicts with federal law. See New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 1671, 1675 (1995); Hillsborough County v. Automated Medical Lab., Inc., 471 U.S. 707, 712-13 (1985).

⁷ S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (Conference Report) (emphasis added).

⁸ See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 at ¶ 4 (Aug. 8, 1996).

⁹ See H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1, at 50 (1995).

The Act, while not completely displacing state regulation,¹⁰ expressly provides that state regulation inconsistent with the provisions and pro-competitive purpose of the Act are preempted. Thus, Section 261 provides that existing state regulations may only be enforced “if such regulations are not inconsistent with the provisions of this part.”¹¹ As discussed above, Section 253 gives the Commission the authority to preempt regulations such as Section 52.355, that stand in direct conflict with the pro-competitive objectives of the Act.

MCI concedes that Section 253(b) preserves Alaska’s authority to “impose, *on a competitively neutral basis* . . . requirements *necessary* to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”¹² However, because it has not and cannot be argued that Section 52.355 is “competitively neutral” or “necessary” to further any of Section 253(b)’s legitimate goals, MCI believes, as does Commissioner Ornquist,¹³ that the APUC’s decision to postpone a decision on the regulation’s fate is improper and unnecessarily delays the benefits of competition to Alaskan consumers.

¹⁰ See 47 U.S.C. § 601.

¹¹ See 47 U.S.C. § 261(b).

¹² See 47 U.S.C. § 253(b) (emphasis added).

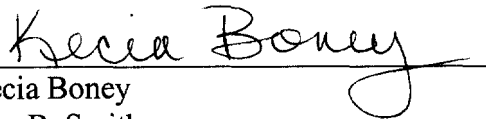
¹³ “The intent of the Telecom Act of ‘96, of course, is to bring competition to a greater degree in the telecommunications industry. And I think that the regulation we have on the books is totally, completely 180 degrees the other direction. It may even have been a good regulation when we put it in there, but according to the Telecommunications Act and the FCC the requirements that are placed on us as a State regulatory authority, I don’t think that that regulation is enforceable anymore. I believe we have been superseded on this, and specifically and blatantly on the part where it says that it must be competitively neutral. Sorry. It’s not competitively neutral at all. So I don’t get to the part where we have any kind of policy call to make.” Remarks of Commissioner Ornquist. See APUC Public Meeting Transcript at 24-25.

CONCLUSION

Section 52.355 of the AAC remains in effect, despite its obvious conflict with the requirements of Section 253 of the Communications Act. Until it is repealed, GCI and other would be competitors are forbidden from constructing and operating telecommunications facilities in a large number of Alaskan communities. The direct result of which is the denial of the benefits of a competitive intrastate interexchange market -- improved service at lower rates. Consistent with Congress's mandate to bring the benefits of competition to all markets, MCI urges the Commission to exercise its preemption authority and declare Section 52.355 unlawful.

Respectfully submitted,

MCI Telecommunications Corporation

A handwritten signature in cursive script, reading "Kecia Boney", is written over a horizontal line.

Kecia Boney
Lisa B. Smith
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 887-3040

February 27, 1998

CERTIFICATE OF SERVICE

I, Lonzena Rogers, hereby certify that on this 27th day of February, 1998, I served by first-class United States Mail, postage prepaid, a true copy of the foregoing Comments, upon the following:

A. Richard Metzger *
Chief
Federal Communications Commission
Common Carrier Bureau
1919 M Street, NW
Room 500
Washington, DC 20554

Carol Matthey *
Acting Chief
Policy & Program Planning Division
Federal Communications Commission
1919 M Street, NW
Room 544
Washington, DC 20554

Janice Myles *
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Room 544
Washington, DC 20544

Mark J. Vasconi
Regulatory Affairs Director
Alascom, Inc. d/b/a AT&T
Alascom
210 East Bluff Drive
Anchorage, Alaska 99501-1100

AT&T Alascom
A. William Saupe
Ashburn & Mason
130 West Sixth Avenue, Suite 100
Anchorage, Alaska 99501

ITS
1231 20th Street, NW
Washington, DC 20036

Joe D. Edge
Drinker Biddle & Heath LLP
901 Fifteenth Street, NW
Suite 100
Washington, DC 20005

Magalie Roman Salas *
Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20544

Ron Zobel, Esq.
Assistant Attorney General
Alaska Public Utilities Commission
1031 West Fourth Avenue
Suite 200
Anchorage, Alaska 99501

*Hand Delivered


Lonzena Rogers